FOR ARGUMENT

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-839

EDMUND FOLEY, individually and on behalf of all other persons similarly situated,

Plaintiffs-Appellants,

—against—

WILLIAM G. CONNELIE, individually and in his capacity as Superintendent of the New York State Police, and S. A. SMITH, individually and in his capacity as Director of Personnel of the New York State Police,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANTS

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Restatement and Clarification of the Case

Appellees have, for the first time, raised questions about appellant Foley's eligibility for naturalization prior to the September, 1975 competitive examination for the New York State Police Force and about his ability to meet statutory age requirements for appointment to the Force by the time he is able to attain the status of a United States citizen.

Brief for Appellees, p. 2. These facts have never been put in issue at any prior stage of this litigation.

Appellant Foley was born on June 20, 1950. He first entered the United States on a visa in February, 1973. He obtained permanent resident alien status on October 31, 1974 and he will not become eligible to apply for naturalization until October 31, 1979, when he will have fulfilled the five-year residency requirement for United States citizenship, 8 U.S.C. § 1427(a). These facts are a matter of public record with the Immigration Service. By the time he becomes eligible to apply for naturalization on October 31, 1979, appellant Foley will have passed his twenty-ninth birthday, and he will therefore be ineligible for initial appointment to the New York State Police Force under Executive Law § 215(3) which provides that appointees must be "between the ages of twenty-one and twenty-nine years." (McKinney 1972). Although the statute enables the Superintendent of the New York State Police to extend the maximum age to thirty-five at his discretion, appellant Foley was not informed of this possibility at the time of his application. There has never been any indication that the Superintendent would be prepared to waive the usual age requirement, and none of the papers or affidavits submitted in this case by appellees have ever addressed this issue. In any event, such a waiver could not possibly apply on a class basis. There will always be aliens whose age will exceed the statutory maximum for appointment to the Police Force by the time they are eligible for United States citizenship.

Appellees have also introduced new factual allegations as to appellant Foley's performance on the September 20, 1975 examination for the first time in their brief. Brief for Appellees, p. 2. Neither appellant nor his counsel has ever

received any notification of the results of the tests. The reference to his standing is without basis in the record. If appellant prevails in this case, he will try to get his test score and, if not satisfied, the raw data which formed the basis of the result.

In any case, the score which appellant Foley received on the competitive examination is entirely irrelevant to the constitutional issue before the Court. The appellants in this action are not seeking a guarantee of employment with the New York State Police Force. Rather, they are asserting their right to be considered for the position of State Trooper without regard to their alien status. The fact that this case has been certified as a class action makes it clear that appellant Foley's performance on the examination cannot affect the justiciability of this important equal protection issue.

POINT I

The Exclusion of Aliens From Employment Must Be Given Strict Judicial Scrutiny and Measured by a Compelling State Interest Test.

The appellant in this case has been placed in the peculiar posture of arguing from what is usually the appellee's position. The precedents and principles are all on appellant's side. It is up to the appellees to find some way of distinguishing Executive Law § 215(3) from the many similar alienage classifications which have been struck down by this Court. But turn and twist as they will, they can find no such loophole.

New York Executive Law § 215(3), by barring any employment of aliens in the entire New York State Police Force, has clearly created a classification which is "in-

herently suspect and subject to close judicial scrutiny." *Graham* v. *Richardson*, 403 U.S. 365, 372 (1971). Appellees, as the first step in seeking to distinguish the overwhelming weight of precedent, have relied on the suggestion in *Sugarman* v. *Dougall*, 413 U.S. 634, 648 (1973) that classifications which "deal with matters resting firmly within a state's constitutional perogatives" may be subjected to a "less demanding standard" than the one enunciated in *Graham* and have attempted to invoke the more lenient rational relationship test for the eligibility requirement at issue in this case. But, this Court's recent decision in *Nyquist* v. *Mauclet*, —— U.S. ——, 53 L.Ed. 2d 63 (1977) reaffirms the federal judiciary's obligation to subject alienage classifications to a "stringent examination." *Nyquist* v. *Mauclet*, 53 L.Ed. 2d at 70. According to *Mauclet*, a defendant's allegations that a given alienage classification has been adopted pursuant to the state's interest in preservation of its "political community" will not be accepted at face value and will not be sufficient to invoke the exception suggested in *Sugarman*. The majority opinion in *Mauclet* explains that in carving out an exception to the traditional strict scrutiny standard for alienage classifications, "the Court [in *Sugarman*] had in mind a State's historical and constitutional powers to define the qualifications of voters, or of 'elective or important nonelective officials' who 'participate directly in the formulation, execution or review of broad policy.'" (Footnotes omitted) *Nyquist* v. *Mauclet*, *supra*, 53 L.Ed. 2d at 72 quoting *Sugarman* v. *Dougall*, 413 U.S. 634, 647 (1973). The *Mauclet* decision points to *In Re Griffiths*, 413 U.S. 717 (1973) as evidence of "the narrowness of the [*Sugarman*] exception," stressing the fact that the citizenship requirement for admission to the Connecticut bar was invalidated in *Griffiths*, "despite a recognition of the *vital public and political role* of attorneys" in our society. (Emphasis added) *Nyquist* v. *Mauclet*, *supra*, 53 L.Ed. 2d at 72.

The Court recognized in *In Re Griffiths* that one who performs a "vital public and political role" need not be "so close to the core of the political process as to make him a formulator of government policy" within the meaning of the limited *Sugarman* exception. *In Re Griffiths, supra*, 413 U.S. at 729. Appellees themselves have called the New York State Police Force a "paramilitary" operation, and whatever degree of "discretion" police should or do have (and appellant finds appellees' characterization of the police officer's discretionary functions somewhat overstated), it is clear that its members do not "participate directly in the formation, execution or review of broad public policy." Their occupation, though necessary to the general welfare, involves neither the broad discretion nor the important legal and judicial functions which characterize the "vital public and political role" of attorneys.

Litigation is one form of making public policy—acting as a policeman is not. The police officer's discretion, if any, is exercised after policy decisions and political input have been made. Policemen work for a law *enforcement* agency. Lawyers affect the laws which policemen enforce. If aliens can be lawyers, they can *a fortiori* be policemen as well.* The law enforcement responsibilities of individual police officers involve the application of existing policy rather than the formulation of broad new policy.** Pursuant to

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* In addition to performing many other important public functions, American lawyers are officers of the court, are permitted to affirm papers in Federal Courts and in many states, including New York, are automatically eligible for appointment as notaries public. Executive Law § 130 (McKinney 1972).

** Even the highest-ranking members of the New York State Police Force do not engage in the type of broad political decision-making which triggers the *Sugarman* suggestion and legitimates alien exclusion. In any case, as more fully set forth in the Brief for Appellants at pages 31-32, a finding that a citizenship requirement might be appropriate for *some* police positions could not save the New York statute's flat prohibition on alien membership in the entire Force.

the State of New York's interest in preserving its "political community," an alien "may be barred from full involvement in the political arena, [but] he may play a role—perhaps even a leadership role—in other areas of import to the community." *Nyquist* v. *Mauclet, supra,* 53 L.Ed. 2d at 72.

Edmund Foley and the other aliens who are excluded from membership in the New York State Police Force by reason of Executive Law § 215(3) have an even stronger argument for invoking close judicial scrutiny than did the plaintiffs in *Mauclet.* The statute at issue in *Mauclet,* New York Education Law § 661(3), provided that resident aliens would be eligible for state financial assistance for higher education only if they had made application to become United States citizens or had submitted a statement affirming an intent to make such application as soon as they became eligible for citizenship. The dissenting opinions in *Mauclet,* in arguing that a strict scrutiny standard was not the appropriate test under these circumstances, emphasized the fact that New York's refusal to award financial aid to resident alien students did not "deprive aliens of the essential means of economic survival" nor involve a crucial right such as the employment opportunity at stake here. *Id.* at 73. (Burger, J. dissenting). The dissenters also pointed out that each plaintiff in *Mauclet* had "at all times the means to remove himself immediately from the disfavored classification [by applying for citizenship or, if not presently eligible, by submitting a statement of intent to apply]." *Id.* at 77. (Rehnquist, J., dissenting). In contrast, the challenged statute in the instant case affects appellants' fundamental interest in securing employment and operates as an insurmountable barrier to aliens who are presently ineligible for United States citizenship.*

* Appellees' flat assertion that "the alien can change his status," Brief for Appellees, p. 10, is both inaccurate and inconsistent with their earlier admission that "an alien may wish to make a commitment [to the State's political community]" yet be "disabled from doing so because of durational residence aspects of the naturalization process." Motion to Affirm, p. 6. Appellant Foley and many other members of the appellant class are currently ineligible for naturalization because of the five-year residency requirement set forth in U.S.C. § 1427(a)(1) (1970). Appellees contend that his resultant ineligibility for employment in the Police Force is a "dilemma [which] is beyond the State's power to adjust." Motion to Affirm, p. 6.

The citizenship requirement of Executive Law § 215(3) has categorized these appellants by a factor which, like their race or sex, they are powerless to control. Appellants are presently unable to remove this statutory bar by "changing" their status to that of United States citizens; until they become eligible for naturalization, they are unable to avoid a period of discriminatory treatment. Contrary to appellees' assertions, the State of New York has the power—and, under the Fourteenth Amendment, the affirmative duty—to remove the "dilemma" which its statutes have forced on aliens who cannot change their status and who wish to become members of the New York State Police Force.

POINT II

Appellees Have Failed to Meet Their Burden of Justifying New York Executive Law § 215(3) Under Either the Strict Scrutiny or the Rational Relationship Test.

The State of New York has at no point demonstrated that the State Police Force's important functions would be in any way impaired by the inclusion on the Force of aliens who have demonstrated their personal commitment to the community and to effective law enforcement.* Indeed, the

* Appellees make much of the important social interest in having a police force, which appellant concedes. Brief for Appellees, pp. 3-4. But a general justification for an institution does not bear a justifying relationship to discriminatory exclusion. Public employment and the legal profession have important societal goals which are not relevant to and form no justification for alien exclusion. So here, the importance of a police force does not excuse discrimination in its composition.

amicus brief of the Mexican American Legal Defense and Education Fund and the Asian Law Caucus has demonstrated the contrary. There is absolutely no evidence that "the alien's primary allegiance to the country of his nationality continues until renounced in the course of naturalization." Brief for Appellees, p. 17. Nor is any basis proffered for this astonishing assertion. In *In re Griffiths,* this Court pointed out that the oath of office would provide sufficient guarantee of an alien attorney's loyalty. *In re Griffiths, supra,* at 726, n. 18. See Brief for Appellants, p. 21. And indeed if the oath of naturalization could prove the *bona fide* of performance, *a fortiori* a specific oath of allegiance designed by the New York State Police Force could provide the necessary guarantee of the alien applicant's loyalty and willingness to adhere to the department's requirements.

Appellees have attempted to undercut appellants' assertion that aliens are integral members of their communities and are capable of a high degree of personal commitment to effective law enforcement by citing examples of ways in which "the alien is treated differently than the citizen in the Armed Forces." Brief for Appellees, p. 18. Nothing in appellees' argument, however, negates the fact that the United States government has recognized the ability of aliens to uphold this country's laws and ideals through service in the Armed Forces.

The facts that certain aliens are able under the Selective Service laws to obtain exemptions from military service by changing their status to non-immigrant (an act of denying allegiance) and that aliens are barred from holding commissioned offices in three of the five services in no way negates the relevant fact that the federal government has entrusted its security to aliens as well as to citizens. Appellees' reliance on the existence of treaties between the

United States and various foreign countries providing for reciprocal exemption from military service is unfounded. These agreements have merely enabled so-called treaty nationals to apply through their embassies for a IV-C classification granting them a permanent exemption from military service. In obtaining such an exemption, treaty nationals lose their eligibility for United States citizenship and become amenable to exclusion if they leave the United States. Gordon & Rosenfeld, *Immigration Law and Procedure,* § 2.49c (1977 ed.). The federal government in allowing certain resident aliens to apply for exemptions in exchange for reciprocal rights for U.S. citizens makes no judgment about the loyalty or trustworthiness of aliens as a class. Rather, it gives aliens who do not wish to perform military service or to become U.S. citizens an opportunity to exempt themselves. Those treaty aliens who feel differently are entirely free to contribute to the national security through service in the Armed Forces.

By the same token, appellants, who on an entirely voluntary basis are prepared to undertake the dangerous job of law enforcement, cannot be denied access to their chosen occupation based on an irrelevant citizenship requirement. Rather, they must be allowed to demonstrate that their abilities and their personal commitment to the community qualify them for membership in the New York State Police Force.

CONCLUSION

New York Executive Law § 215(3)'s absolute statutory bar to the employment of aliens in the New York State Police Force creates a classification which cannot withstand strict judicial scrutiny under the equal protection clause of the Fourteenth Amendment. This baseless discrimination falls outside the State's interest in limiting participation in its most fundamental governmental processes to those within its "political community," an interest which this Court recognized as legitimate in *Sugarman* v. *Dougall*. It is instead analogous to the Connecticut rule excluding aliens from taking the state bar examination which was invalidated in *In Re Griffiths*. In this case as in *In Re Griffiths*, the State has totally failed to meet the "heavy burden" of justicication which is "appropriate . . . when it deprives [resident aliens] of employment opportunities." *In Re Griffiths, supra*, 413 U.S. at 722.

For the foregoing reasons, we respectfully request that this Court reverse the decision of the District Court.

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